IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

PUBLIC INTEREST LITIGATION NO. 68 OF 2006

Breach Candy Residents Association
& Ors. ...Petitioners

V/s.

Municipal Corporation of Greater
Mumbai & Ors. ...Respondents

Shri D.J. Khambatta, Senior Advocate with Shri Phiroze Palkhiwala, Shri Jamshed Mistry and Shri Vivek Sharma for the Petitioners.

Shri K.K. Singhvi, Senior Advocate with Mrs.Priti Purandare for Respondent No.1.

Shri B.A. Desai, Additional Solicitor General for Respondent No.2.

Shri R.V. Govilkar for Respondent No.3.

Shri K.R. Belosey, Government Pleader, Respondent Nos.4 and 9.

Shri Janak Dwarkadas, Senior Advocate with Shri P.K. Shroff and Ms.Radhika Ranpise instructed by M/s.P.K. Shroff & Co. for Respondent No.5.

CORAM : H.S. BEDI, C.J., &
V.M. KANADE, J.

DATED : DECEMBER 7, 2006.

ORAL JUDGMENT (PER V.M. KANADE, J.) :-

1. By this petition, the petitioners - Breach Candy Residents Association through its Chairman and others have filed Public Interest Litigation challenging the construction of a parking tower and commercial structure on a plot situated on seaward side of Bhulabhai Desai Road and near junction of Bhulabhai Desai Road and Gamadia Road. The petitioners are also challenging the contract executed between the developers and the Corporation and also the notice inviting tender and other related documents and the final contract entered into between respondent no.1 and respondent no.5 including sanctions and permissions for construction of the parking tower and commercial structure by respondent no.5. The petitioners are also seeking a writ of mandamus directing respondent nos.1 and 5 to demolish the walls and the structure which have been constructed so far and to restore the said plot to its original condition.

FACTS :-

2. Petitioner no.1 is a registered body and its members are residents of Breach Candy and neighbouring areas in the city of Mumbai. The object of the petitioners Association was to look after the welfare of the residents so as to ensure a better life and standard of living for the residents of the locality. The other three petitioners are public spirited individuals who claim to have taken up the present cause to ensure that Development Control Rules and Regulations are followed and illegal constructions which are wrongly sanctioned by the Corporation are demolished.

3. The said plot originally belonged to the State Government and was transferred to respondent no.1 alongwith Land in C.S.No.838 under GSRD Nos.7421/33 dated 30.8.1939 and 9.6.1941 on the nominal compensation of Rupee 1 for use as a public garden. The land in C.S.No.838 was to be used as a children's play ground. Later, the user of

land was changed and it was thereafter reserved for a parking lot, public sanitary convenience and welfare centre. It would be necessary to note the relevant dates and chronology of events in this case. On 2nd December, 2002, a proposal was forwarded by the Commissioner of Mumbai to the Improvements Committee of respondent no.1 for the construction of a multi-level mechanized parking tower for public use and the commercial user building for the benefit of the successful tenderer. Accordingly, a tender notice was issued by respondent no.1 on 18th April, 2002 and the tender process was completed and the tender of respondent no.5 was accepted on 21st April, 2003 whereby the proposal of respondent no.5 for sanction of a mechanized multi storey car parking on “Built-Operate and Transfer” (BOT) basis alongwith departmental store on the plot of land belonging to the Municipal Corporation of Greater Mumbai was accepted. It is an admitted position that the proposal was widely published in the newspapers and was discussed and debated in the Municipal Corporation. After the tender notice was issued, a site visit was organized and the Improvements Committee passed resolution dated 24th January, 2003. On 22nd April,

2003, it appears that the respondent no.2 issued notification whereby the Coastal Area Regulation Zone Notification dated 19th February, 1991 was amended. One of the amendment which was proposed and carried out was regarding activities where the deposit was Rs.5 crores or more would require sanction of respondent no.2. Respondent No.5 obtained the various approvals from various departments. The officer of respondent no.1 obtained legal opinion regarding the construction work done by respondent no.5 on 12th January, 2005. The conditions of IOD were issued from respondent no.1 to respondent no.5 on 29th March, 2005. It is the case of the petitioners that sometime in or around mid October, 2005, some of the residents of the area noticed that some excavation work was going on in the said plot and they alerted petitioner no.1 in the matter. Thereafter, application was filed by petitioner no.1 on 25th October, 2005 requesting respondent no.1 to furnish the relevant documents to the petitioner and the documents were received by petitioner no.1 on or about 14th November, 2005. Thereafter, several meetings were held by the petitioners and other members and respondent no.3 informed about the violation of the

Development Control Regulations and the CRZ notification. However, the second and the third respondent did not take any action to stop the said construction and to implement the law. Thereafter, the present petition was filed in May 2006.

4. The learned Senior Counsel appearing on behalf of the petitioners, Shri D.J. Khambatta, submitted that the plot, in question, was specifically earmarked as a parking lot, welfare centre and public toilet. He submitted that the present construction carried out by respondent no.5 is clearly contrary to the purpose for which the plot was reserved since the Municipal Corporation had sanctioned the plan of respondent no.5 and had permitted them to have a departmental store on the said plot. It is submitted that therefore, construction was contrary to the provisions of the Maharashtra Town Planning Act and Rules framed thereunder. The second submission was that the said construction was contrary to the provisions of Development Control Regulation No.52 in which were detailed provisions were made regarding the developments which were specifically prohibited in R-2 zone. He submitted that therefore, the user of the plot for constructing a

departmental store was patently illegal and therefore, this Court should issue a writ of mandamus or appropriate writ and restore the plot to its original condition. He submitted that the Apex Court and this Court in catena of cases had held such a petition for demolition of illegal structure was maintainable even at the instance of the residents of that locality and therefore, it could not be said that this petition was not maintainable. The learned Senior Counsel then submitted that the construction was clearly violation of CRZ notification of 1991 since the plot was covered on all three sides by sea and no permission had been obtained from the CRZ authority. He further submitted that Development Control Regulation No.59 was also clearly violated since the regulation pertaining to the height of the structure as laid down in the said regulation was violated and the parking lot which was sought to be constructed was beyond the deadline of 22 metres as set up by the said regulation. He further submitted that the notification which was issued wherein the stipulation had been laid down amending the existing regulation of taking permission of the competent authority if the work carried out was more than 5 crores had not been followed and no

permission was obtained and on that count also the construction was patently illegal. He thereafter submitted that apart from being illegality which was committed by respondent no.5, the various terms and conditions of the BMC Act and MRTP Act and other related acts had been violated. His last submission that there was no delay in filing the petition and that the petition was filed in May 2006 after the residents had come to know about the illegal excavation by respondent no.5 on the said plot sometime in mid October 2005 and thereafter, application was made for necessary documents on 25th October, 2005. Letters were written to the concerned authorities regarding the illegal committed by respondent no.5 and when no response was given to the said letters by the said authorities, the present petition was filed. He submitted that therefore, there was no delay on the part of the petitioners in approaching this Court. He invited our attention to the various judgments of the Supreme Court on the aforesaid submissions which shall be considered in subsequent paragraphs.

5. Shri Janak Dwarkadas, learned Counsel appearing

on behalf of the respondent no.5 submitted that there was no illegality committed by the respondents. He submitted that the petition was liable to dismissed In limine on the ground of delay and laches. He submitted that decision was taken by respondent no.1 to invite tenders for the public purpose for which the plot was reserved i.e. for parking of vehicles and that it was decided by the Corporation to invite tenders in 2002 itself to construct the said project on BOT basis. He submitted that the entire process of inviting tenders, scrutiny of tenders was completed after proper procedure was followed by the Municipal Corporation and that these tenders were published in various newspapers. Similarly, decision regarding the proceedings and the details of the issue was also widely published in the newspapers. He submitted that after construction had come upto the seventh floor, the present petition was filed by the petitioners. He submitted that obviously there was gross delay on the part of the petitioners and that the respondent had acted to their detriment by spending huge amounts and therefore, it was not open for the petitioners to challenge the said construction. He submitted that the respondent had already invested more that four crores

on the said project. He also invited our attention to the judgments of the Supreme Court on the point of delay in filing writ petitions as well as public interest litigation and on the basis of the ratio laid down in these judgments, he submitted that the petition was liable to be dismissed In limine with costs. He then submitted that the submission of the learned Counsel for the petitioners regarding the violation of DC regulation no.52 was not correct. He submitted that it was common knowledge that the plots which were reserved for the purpose of public utilities were never developed since the Corporation did not have either the expertise or the finance for undertaking the huge public project and therefore, over the years, decision had been taken by the Corporation to invite private parties to construct the plots for public utilities and public purpose and also permit such parties to earn a reasonable profit. He submitted that this policy had been accepted for quite some time throughout the country and as a result of this policy, several important projects which were pending for several decades had been completed within a short period of time. So far as violation of DC regulation no.52 is concerned, he submitted that there was nothing illegal about

the construction which was undertaken by the respondents. He submitted that the plot which was reserved for the public purpose could be developed if the main development was for the dominant purpose and at the same time, the plot was also developed for ancillary purpose. He submitted that merely because part of the construction was for ancillary purpose that by itself would not make the entire construction illegal. He invited our attention to the DC regulation 50, 51 and 52 sub-clause 4 and sub-clause 6. He submitted that though sub-clause 52-2 laid down that no new shopping line should be constructed in certain areas specified in sub-rule 2, yet sub-rule 4 laid down the uses which were permitted in the residential zone with shop line. He invited our attention to sub-clause 4(ii). He submitted that this sub-rule clearly showed that the shops or stores for construction of retail business included departmental stores were permitted under the said clause. He further invited our attention to 52 sub-clause 6 wherein it was laid down that special permission of the commercial shopping use and departmental stores could be permitted by the Municipal Commissioner. He therefore submitted that the contention of the petitioners that

departmental stores could not be constructed in buildings in R-2 zone, was not correct. In support of this submission he relied upon the judgments of this Court, Supreme Court which has been dealt with in the subsequent paragraphs. So far as the submission of the petitioners regarding violation of CRZ notification, it is submitted that there was no violation as alleged and invited our attention to the provisions of CRZ notification and also to various judgments of this Court and the Supreme Court wherein it is laid down that if there is a construction which is already in existence beyond the plot towards the sea side then a imaginary line had to be drawn from the said structure and if the new construction was inside the said imaginary line then there would be no violation of CRZ notification. He also relied on several judgments of the Apex Court and this Court in support of this contention. He then made in his submission regarding the alleged violation of DC regulation no.59. He invited our attention to the said regulation and pointed out that the dominant purpose for which the construction was being carried out was for providing a car parking. He pointed out that on the said plot initially 30 cars were parked but now 230 car parking space would be

available after the construction was over. He submitted that the departmental store which was being constructed adjacent to the parking tower was below 22 metres and there was no violation of the said DC regulation no.59. He relied on the Division Bench Judgment of this Court in support of the submission which shall be dealt with in subsequent paragraphs. He further submitted that objection regarding the violation of the terms and conditions of the contract regarding structure of the parking car being given to the exclusive use of the Corporation is concerned, he submitted that the said objection was frivolous since the parking lot would be made available to the entire public and it was immaterial whether a wall was constructed between the parking lot and the departmental store since this issue was strictly between the Corporation and respondent no.5 and the petitioners were not concerned about it. He submitted that so far as the permission which was required to be taken for construction above 5 crores is concerned, the said notification had come in force on 22nd April 2001 and in the present case, the acceptance of the proposal was made on 21st April, 2003 and therefore, the said notification would not apply to the facts of

the present case. And that in addition and over and over above that they had already applied for permission without prejudice to the aforesaid contentions and that the Corporation had said that completion certificate would only be granted if the relevant permission was obtained. He submitted that therefore, the said objection also would not survive.

6. The learned Counsel Shri K.K. Singhvi, appearing on behalf of the Corporation also adopted the arguments made by the learned Counsel for respondent no.5 and relied on some of the judgments of this Court and the Apex Court.

7. Since the pleadings were complete by the consent of the parties, we thought it fit to hear the matter finally at the admission stage and accordingly, we have heard the learned Counsel appearing on behalf of the parties at length. Hence, Rule. Rule made returnable forthwith with the consent of the parties.

8. We have given our anxious consideration to the submissions made by both the Counsels. Before we

consider the merits of the case and the submissions of the parties, it would be necessary to examine the preliminary objection which has been raised by the learned Counsel appearing for respondent no.5 regarding the delay which is caused in filing this petition. It is an admitted position that tenders were invited by the Municipal Corporation of Greater Bombay on 18th April, 2002 and the entire process was completed and the tender of respondent no.5 was accepted on 21st April, 2003. By the time, the petition was filed in May 2006. Respondent No.5 had spent considerable amount of money and had acted to his detriment after his tender was accepted and the seventh storey of the parking lot tower was already completed and by the time, this petition was taken up for hearing, the entire tower of the parking lot was already constructed. It is further an admitted position that the tenders were published in the newspapers and the issue was debated in the Municipal Corporation and this was given due publicity in the newspapers. It must be necessary to consider the rival contentions on the point of delay. It would be necessary to take into consideration the law laid down by the Supreme Court on this aspect. In the recent judgment of the Supreme

Court in the case of **Bombay Dying and Manufacturing Company Limited V/s. Bombay Environmental Action group and others reported in (2006) 3 SCC 434, in para 341,** the Apex Court has observed that delay and laches on the part of the writ petitioners are very relevant factors which are to be taken into consideration while deciding the question of grant of relief in the writ petition. The Supreme Court has observed that in large number of cases, the Apex Court has laid down that in cases where by reason of delay and/or latches on the part of the writ petitioners, the parties have altered their positions and/or third party interests have been created, public interest litigations may be summarily dismissed. In para 342, the observation made by the Supreme Court in **Narmada Bachao Andolan V/s. Union of India, reported in (2000) 10 SCC 664**, has been referred to. In the said case, it has been held by the Supreme Court that merely because a petition is termed as PIL it does not mean that the ordinary principles applicable to litigation would not apply and if a project is undertaken and the same is challenged after its execution has commenced, it should be thrown out at the very threshold on the ground of laches. While in para 343, the

Supreme Court has referred to the case of **R & M Trust V/s. Koramangala Residents Vigilance Group, reported in (2005) 3 SCC 91**. In the said case, the Supreme Court had observed that the Sacrosanct jurisdiction of public interest litigation should not invoked in favour of persons who are not vigilant. In para 334 of the said judgment, the Supreme Court has referred to the case of **State of Maharashtra V/s. Digamber reported in (1995) 4 SCC 683**. The Supreme Court in the said case has observed in para 14 that relief granted in favour of a person who is guilty of laches and undue delay, such a relief would become unsustainable even if it amounted to deprivation of the legal right of such a petitioner. Thereafter, the Supreme Court in para 345 has laid down that there cannot be any hard and fast rule and each case therefore has to be considered on its own facts and circumstances.

9. Since we have already referred to in detail the submissions made by either side on the question of delay, we do not intend to reproduce again the said submission of both the parties on this point. In our view, there cannot be in any

manner of doubt that there has been enormous delay on the part of the petitioners to approach this Court. The grounds for explaining the delay which are given in paras 35 and 36 of the petitioners are not sustainable. The process of awarding tender had started in the year 2002. Respondent No.5 was awarded the tender after the procedure was properly followed. It is not the case of the petitioners that there was any irregularity in awarding the tender to respondent no.5 and they have not challenged this decision nor the decision making process of awarding the tender in favour of respondent no.5 in the petition. It has not also been disputed that the issue of construction in the said plot and invitation of tenders was widely published in the newspapers and the media. It is not possible to accept the explanation of the petitioners that because there was a aluminium fence erected around the plot, they could not know what was the construction which was going on that plot. The petition was filed in May 2006 and if the date of invitation of tender is taken into consideration, there is delay of almost four years in filing the petition. Further by that time, respondent no.5 had already spent huge amount of money for the project and had already entered into a contract

for importing the mechanized parking lot from certain parties abroad. The ratio of the judgments of the Apex Court referred to in **Bombay Dyeing Case (supra)**, in our opinion, is squarely applicable to the facts of the present case. The respondent no.5 had entered into a contract with respondent no.1 after his tender bid was accepted. The execution of the work had commenced and reached half way by the time the petition was filed. The respondent no.5 had altered its position to its disadvantage by accepting the said tender and invested huge amounts and the plea raised by the petitioners that they had no knowledge about the tender to respondent no.5 and that they came to know only after construction had started, does not appear to be probable. It is not the petitioners case that this particular contract was arbitrarily and capriciously awarded to respondent no.5. It is not the petitioner's case that the Corporation had undertaken this exercise only for the purpose of giving benefit to the respondent no.5. The Corporation already had taken a decision to have a mechanized parking lot so that the acute parking problem which was faced in that area could be resolved and parking was made available to the public at large. It is an admitted

position that the famous Mahalaxmi temple is adjacent to this site and the Corporation has undertaken to prepare a connecting bridge to the precincts of Mahalaxmi temple. It is also a matter of common knowledge that during the Navratri festival, large number of pilgrims come here to take darshan of Mahalaxmi and it creates a further difficulty in having proper parking facility in that area. The Corporation keeping in view all these problems and after having taken the site inspection and opinion from the experts, had prepared the scheme and had invited tenders by publishing the notice in newspapers. In the light of these facts there is always a possibility of a unsuccessful bidder inciting the residents to challenge the construction having lost the tender. Keeping in view these possibilities of a person having an interest in the matter inciting residents to challenge the scheme is always possible. That would be one more additional factor in our view which would come in the way of the petitioners, though we do not want to suggest that in this particular case this has happened, which would preclude the petitioners from agitating their reliefs in this petition belatedly. It is further to be seen that by the time the petition was taken up for final hearing at the admission

stage, all the slabs in the parking tower had been constructed and the dominant purpose of the said project is admittedly for public use such as providing parking facility, welfare centre and other facilities. Under these circumstances, in our view, the petition is liable to be dismissed on the ground of delay.

10. Though we have dismissed the petition summarily on the ground of delay, we must point out that we had heard the respective parties at length on the merits of the case also. We are prima facie satisfied that there is no illegality committed by respondent no.1 in inviting tenders for the construction of a mechanized parking lot with a ground plus one storey structure having departmental stores. The case of the petitioners is that there is violation of DC Regulation No.52 sub-clause which prohibits construction of a new shopping line abutting street particularly on various roads mentioned in the said sub-clause and Bhulabhai Desai Road i.e. a place on which the said construction is carried out is one such road. On the other hand, learned Counsel appearing on behalf of the Corporation and respondent no.5 have relied on Regulation Nos.49, 50 and 52 sub-clause 4 and 52 sub-clause

6. Regulation Nos.49 and 50 read as under :-

> **"49. Uses and Ancillary Uses :- The uses and specified ancillary uses as indicated in these Regulations will be permitted in each of the predominant use zones as shown in the development plan. Such ancillary uses will be subject to fulfilment of the prescribed conditions.**
>
> **50. Power of Granting permission :- Where it is specified that a particular use is to be allowed only with the Commissioner's special permission, the power of granting such permission shall be exercised by the Commissioner or an Officer not below the rank of deputy Municipal Commissioner."**

Whereas Regulation No.52(2) reads as under :-

> **"52(2) No new shops will, however, be permitted on plots in the residential zone with a shop line (R-2 Zone) which abut and are along the following roads, even if a shop line is marked on such roads in the development plan except what is permitted by way of convenience shopping.**
>
> **(a) xxxxxxxxx**
>
> **(b) xxxxxxxxx**
>
> **(c) xxxxxxxxx**
>
> **(d) xxxxxxxxx**

(e) xxxxxxxxx"

Similarly, Regulation 52(4)(2) reads as under :-

"52(4) Uses permitted in the Residential Zone with Shop Line (R-2) :- The following uses shall be permitted in buildings, premises or plots in a residential zone with shop line:-

(i) xxxxxxx

(ii) Stores or shops for conduct of retail business, including department stores. There will, however, be no storage or sale of combustible materials except with the Commissioners special permission.

(iii) xxxxxx"

Similarly, Regulation No.52(6) reads as under :-

"52(6) With the special permission of the Commissioner, shopping uses and departmental stores may be permitted on the entire ground floor of the building, subject to the following conditions :-

(i) xxxxxx

(ii) xxxxxx

(iii) xxxxxx"

11. A perusal of the aforesaid regulations indicate that even in a residential zone shop line (R-2 zone) a user of stores or shops for conduct of retail business including departmental store is permitted. Similarly, sub-clause 6 empowers the Commissioner to grant permission for shopping business and departmental stores subject to certain conditions. A perusal of the aforesaid regulations indicate that it cannot be said prima facie that such a user could be prohibited as is evident from 52 sub-clause 4 and 6.

12. Similarly, so far as regulation 59 is concerned, plot in question which falls in category-I, the maximum hight has been prescribed 22 metres in the Island City and 16 metres in the suburbs and extended suburbs. In the present case, the height of the departmental store is less than 22 metres and the height of Car Park Tower is 50 metres which is permissible under D.C. Regulation 64 since the tower is for public use. There is, therefore, no contravention of Regulation 59.

13. Similarly , regarding the alleged violation of CRZ 91 also, it will be seen that there is a structure behind the plot in

question and if a imaginary line is drawn, then the construction in question is inside that imaginary line and therefore, prima facie it cannot be said that there is violation of CRZ. Thirdly the contention regarding permission not being obtained by respondent no.5 from respondent no.2 and also in respect of permission for construction in view of the cost of construction being about 5 crores is concerned, the learned Counsel appearing on behalf of the Corporation, Senior Counsel, K.K. Singhvi, has submitted that as long as the said permission is not obtained by respondent no.2, completion certificate will not be granted by the Corporation. He submitted that respondent no.5 had applied for the NOC from the concerned authorities. He invited our attention to the Judgment of the Supreme Court in the case of **Municipal Corporation of Greater Mumbai V/s. Bombay Environmental Action Group** in which a similar objection was raised and that this aspect was noted by the Apex Court in its said order. Since the submission is made by the Corporation that completion certificate would not be granted to the respondent no.5 as long as the aforesaid permissions are obtained, in our view, no prejudice would be caused since if the permission is rejected

the entire exercise carried out by the respondent no.5 would become futile and the apprehension of the petitioners would be put to rest. It is an admitted position that no ad-interim relief was granted in favour of the petitioners after the petition was filed in May 2006 and by this time, the entire structure has come into existence. Therefore, the said objection also cannot be accepted. We have briefly discussed the submissions made by the learned Counsel for the petitioners on merits in order to point out that even though we are satisfied that the petition is not maintainable on the ground of delay, we have also considered the said submissions and we are satisfied that even on merits petitioners have not made out any case for interfering with the contract executed by the parties while exercising our writ jurisdiction.

14. In the result, the writ petition is dismissed. Rule is discharged. Under the circumstances, there shall be no order as to costs.

CHIEF JUSTICE

V.M. KANADE, J.